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Issue date: 08May2002

CASE NO.: 1998-CAA-7

In the Matter of

GREGORY C. SASSE,
Complainant

v.

OFFICE OF THE UNITED STATES ATTORNEY, UNITED STATES DEPARTMENT OF JUSTICE,
Respondent

RECOMMENDED DECISION AND ORDER[1]

BACKGROUND AND RATIONALE

Complainant, Gregory C. Sasse, filed an initial complaint with the Secretary of Labor dated November 25, 1996, alleging that his employer, Office of the United States Attorney, United States Department of Justice (DOJ), violated the whistleblower protection provisions of the Clean Air Act (CAA), 42 U.S.C. §7622 (1994), the Solid Waste Disposal Act (SWDA), 42 U.S.C.§ 6971 (1994) and the Federal Water Pollution Control Act (WPCA), 33 U.S.C. § 1367 (1994)(collectively "the environmental statutes"). Specifically, Complainant alleges that he has been subjected to an ongoing course of retaliatory discrimination by his DOJ supervisors because of his investigation and prosecution of environmental crimes.

The relevant portions of the environmental statutes provide:

The Clean Air Act (CAA), 42 U.S.C. §7622(a):

> No employer may discharge any employee or otherwise discriminate against such employee with respect to his compensation, terms, conditions or privileges of employment because the employee -

[1]Any mention of alleged illegal or questionable activity or problems associated with any other case or site refers to the allegations made by Mr. Sasse. There is nothing in this decision that involves an opinion or evaluation of the allegations made or any actions already taken by the government except as those relate to the treatment of Mr. Sasse. Nothing in this opinion addresses the question of the appropriateness or quality of any past, present or future investigation.

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
> (2) testified or is about to testify in any such proceeding, or
> (3) assisted or participated or is about to assist or participate in any matter in such a proceeding or in any other action to carry out the purposes of this chapter.

The Sewage Waste Disposal Act (SWDA), 42 U.S.C. §6971(a):

> No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

The Federal Water Pollution Control Act (WPCA), 33 U.S.C. § 1367:

> No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

Initial Finding and Request for Hearing

On June 15, 1998, an initial finding was issued by the Wage and Hour Division, Department of Labor (DOL), finding that, "Mr. Sasse was a protected employee engaging in a protected activity within the scope of the whistleblower provisions of [the environmental statutes] and that discrimination as defined and prohibited by the statutes was a factor in the actions which comprise his complaint." The DOJ appealed the decision and requested a formal hearing on the record. The case was then assigned to the undersigned for a formal hearing.

Jurisdiction

On July 28, 1998 Respondent submitted a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Cause of Action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) respectively. Respondent argued that Complainant's duties concerning the prosecution of environmental crimes in his capacity as an Assistant United States Attorney (AUSA) employed by the DOJ, do not constitute protected activity and that it was not Congress' intent to use the whistleblower provisions against governmental offices charged with enforcing the

statues as a means of resolving intra-office conflicts over the allocation of personnel and resources. They argued further that actions and decisions by the U.S. Attorney on prosecutorial matters and personnel performance ratings are discretionary and should not be reviewed by the DOL. This motion was denied by the undersigned on December 8, 1998.

In denying Respondent's motion, I noted that under Fed. R. Civ. P. 12(b)(1), there are two ways to defeat jurisdiction: (1) "facial" attacks on the adjudicator's jurisdiction based solely on the allegations contained in the complaint, and (2) "factual" attacks in which facts outside the complaint are relied upon. Respondents made a "facial" attack, meaning that allegations made in the complaint were accepted as true for purposes of the motion. Relying in part on several DOL decisions that have established that federal employees have statutory whistleblower protection, I determined that the whistleblower protection provisions did not preclude a cause of action by an employee such as an Assistant United States Attorney in this fact situation *See Jenkins v. U.S. EPA*, 1992-CAA-6 (Sec'y May 18, 1994); *Marcus v. U.S. EPA*, 1992-TSC-5 (Feb. 7, 1994); *Pogue v. U.S. Dep't. of the Navy*, 1987-ERA-21 (Sec'y May 10, 1990), *rev'd on other grounds*, *Pogue v. U.S. DOL*, 940 F.2d 1287 (9th Cir. 1987).

Additionally, Respondent argued that the whistleblower provisions do not apply to Complainant or to actions and decisions by the U.S. Attorney on prosecutorial matters such as the exercise of professional judgment in deciding issues concerning the investigation and prosecution of federal crimes and other discretionary matters such as performance evaluations and the allocation of support personnel and office space. The undersigned agreed with Respondent that decisions regarding the investigation and prosecution of federal crimes involves prosecutorial discretion and are not properly before this Court for review. I did however find that the allegations could involve matters beyond the scope of prosecutorial discretion.

Certification to the Administrative Review Board

On March 15, 1999, Respondent filed a Petition for Review with the Administrative Review Board (ARB). The ARB issued a Decision and Order denying the DOJ's Petition for Review and remanded the case for adjudication of the complaint. The ARB determined that the DOJ had "confused the DOL's subject matter jurisdiction over an environmental whistleblower complaint with the wholly separate question of whether Complainant's actions might be covered as protected activities under the environmental statutes." The ARB found:

> By filing a complaint alleging a violation of the whistleblower protection provisions of the environmental statutes, Sasse properly invoked the DOL's jurisdiction to adjudicate the complaint. While DOJ argues that '[t]he acts alleged by the complainant are not, under any reasoned interpretation of the statutes invoked here protected whistleblowing activity,' Petition for Review at 5, it does not contend that Sasse's arguments are frivolous or without color or merit. In fact, DOJ admitted '[i]n certifying this matter for interlocutory appeal, Judge Tierney correctly found that, 'there is obviously substantial grounds for difference of opinion on the question of whether the complainant has engaged in protected activity.' *Id*. at 6. Thus, even if we should ultimately agree with DOJ that

Sasse's duties as an AUSA do not constitute protected activity under the environmental statutes, such finding would not divest the DOL of jurisdiction to hear and decide the case.

Sasse v. U.S. DOJ, ARB No. 1999-053, ALJ No. 1998-CAA-7 (ARB Aug. 31, 2000).

Hearing

A formal hearing was held on July 31, 2001, in Cleveland, Ohio. At the hearing, I granted the parties joint motion for a protective order whereby the parties agreed, and I ordered, that persons with interests protected by the Privacy Act would not be referred to by name, so that references to subjects or targets of pending criminal investigations will not be referred to herein by name, but as subject target John or Jane Doe, with the exception of the Safety Kleen investigation and NASA. Additionally, no disclosure will be made as to the identity of any confidential informant. (Tr 164).

Complainant and Respondent submitted evidence on the final day of hearing, July 17, 2001. At that time, Complainant's Exhibits 2, 4, 10, 11, 12, 13C, 13F, 13G, 13I, 13J, 13K, 14A, 14D, 15, 17A, 17D, 17E, 17F, 18A, 21B, 22A, 26E, 30B, 30E, 30H, 30I, 30J, 31B, 31D, 31H, 31I, 31J, 31L, 31M, 31P, 31R, 31V, 33A, 33D, 42A, 44B, 44C, 44E, 44F, 44H, 59, 60, 61 were admitted to the record.

Respondent's Exhibits A, B2, B3, B4, C1, C2, C3, C5, D4, D6, D7, G2, G3, I2, I5, I6, I7, L1, L2, L2(a), L2(1)(a), L3, L4, L5, N3, N4, N5, N6, N10, N13-19, N29, O2-6, O8-15, P1, P3, Q1, Q2, Q4-11, R1-9, S1-3, T4, T6, T7, T9, T10, U4, U4(a), U5-14, U16, U17, V2, V3, V4, V6, V7, V8, V9, V15, V17, V17(a), V20, V21(a), V21(b), V21(c), X, X1, X2, Y2, Y3, Z1-10 were also admitted to the record.

Employment History of Complainant

In 1983, Complainant applied for a position with the U.S. Attorney's Office (USAO), and later that year began working as an Assistant United States Attorney (AUSA) in the Northern District of Ohio. (Tr 30-33). Complainant was initially assigned to work on a drug task force which was comprised of several federal and state agencies for prosecuting large scale drug organizations. (Tr 34). After working there for two years, he was reassigned to work in the general crime and the economic crime divisions where he prosecuted crimes such as bank robberies, embezzlement, postal theft, mail fraud, crimes committed on federal property or against federal officers, and immigration crimes. (Tr 35-38).

Complainant was assigned to prosecute his first environmental criminal case, *U.S. v. Bogas*, in 1988. This case involved illegal dumping of hazardous material at the Cleveland Hopkins International Airport. (Tr 47). He remained active in the prosecution of environmental cases until 1999 when he underwent open-heart surgery.

Complainant became known as an expert in the field of environmental prosecution. (Tr 130). Complainant's testimony made reference to seventeen environmental cases, each with multiple defendants, that he prosecuted during his tenure at the USAO. (Tr 330). Between 1987 and 1999 he attended approximately seven national seminars held by the Department of Justice for Assistant U.S. Attorneys to discuss recent developments in environmental crime laws and investigative techniques. (Tr 88). He lectured at most of these seminars, addressing effective techniques and strategies for prosecuting environmental crimes. (Tr 89, 128).

Specifically, Complainant presented a lecture on sentencing guidelines at an environmental crime seminar in New Orleans in 1991. (Tr 126). Complainant traveled to that seminar with United States Attorney, Joyce George and the First Assistant United States Attorney, Pat Foley. Mr. Foley requested that Complainant organize an environmental task force consisting of various local, state and federal agencies and officials engaged in environmental crime investigation and prosecution. (Tr 129). He began organizing the task force in 1991. (Tr 137). The task force enabled the entities to combine resources and jointly investigate crimes. (Tr 139-142).

Complainant no longer works on environmental cases. For reasons he does not know, he was no longer assigned cases in the environmental crimes division when he returned to work after undergoing quadruple bypass surgery in 1999. (Tr 253). In April 1995, Complainant reached the maximum salary for an AUSA. He continues to be paid at the maximum rate. (Tr 391, RX R1).

Protected Activity - Normal Duties for an Assistant United States Attorney

Complainant alleges that he was subjected to harassment and discrimination by his supervisors who were motivated by a desire to retaliate against Complainant for his work as a prosecutor of environmental crimes. In order to establish a prima facie case of a violation of the environmental whistleblower statutes, a complainant must show that: (1) he engaged in protected activity; (2) the employer took adverse action against him; and (3) the employer was aware of the protected activity at the time it took the adverse action. *Dean Dartey v. Zack Co. of Chicago*, 1982-ERA-2, (Sec'y Apr. 25, 1983). The complainant also must present evidence sufficient to raise the inference that the protected activity was the likely reason for the employer's adverse action against him. *Id*. The respondent may then rebut the complainant's prima facie showing by producing evidence that the adverse action was motivated by legitimate, non-discriminatory reasons. The complainant may counter the respondent's evidence by proving that the legitimate reason proffered by the respondent is a pretext. In any event the complainant bears the ultimate burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993); *Varnadore v. Sec'y of Labor*, 141 F.3d 625, 630 (6th Cir. 1998).

To establish the first element, Complainant must prove that he engaged in protected activity. Complainant alleges that he engaged in protected activity subject to the protection of the environmental whistleblower provisions on various occasions throughout his career with the DOJ. The environmental statutes at issue protect an individual's participation in activity which furthers the respective statutory objectives. In other words, the Acts protect the reporting of

environmental or safety violations. *See Johnson v. Old Dominion Security*, 1986-CAA-3, 3-4 (Sec'y May 29, 1991). Protected activity is broadly construed under the environmental whistleblower protection acts. *See also Guttman v. Passaic Valley Sewage Commission*, 1985-WPC-2 (Sec'y March 13, 1992). Concerns that "touch on" the environment can be considered as protected activity. *See Dodd v. Polysar Latex*, 1988-SWD-4 (Sec'y March 22, 1994).

Complainant offered the following categories of evidence to purportedly show that he engaged in protected activity: (1) the prosecution of environmental cases; (2) his work generally as a representative of the USAO and the task force; (3) his efforts to expose contamination at NASA/airport property; and (4) his participation in events surrounding a request from Representative Dennis Kucinich that Complainant be detailed to assist with a congressional inquiry.

Prosecution of Cases

Respondent argued in its Post-Hearing Brief that Complainant's protected activity claims hinge on his misapplication of the provisions "filed, instituted, or caused to be filed or instituted in any proceeding" of the Federal Water Pollution Control Act and the Solid Waste Disposal Act, and "commenced, caused to be commenced" in the Clean Air Act as these provisions were never meant to apply to an attorney who files a complaint or initiates a proceeding on behalf of his employer. Respondent contends that Complainant's work as an AUSA was a part of Complainant's assigned duties and therefore, not protected activity. (Respondent's Post-Hearing Brief at 15).

In *Huffman v. OPM*, 2001 WL 914869 (Fed. Cir. Aug. 15, 2001), the Federal Circuit Court addressed the issue of whether a complainant engaged in protected activity while carrying out assigned work assignments through normal channels. Although the Court was interpreting the Whistleblower Protection Act (WPA), 5 U.S.C.§ 2302, Respondent urges that its findings should be adopted here. The case stands for the propositions that "mere performance" of "required everyday job responsibilities" is not protected disclosure, and an employee "cannot be said to have risked his personal job security by merely performing his required duties ... [A]ll government employees are expected to perform their required everyday job responsibilities pursuant to the fiduciary obligation which every employee owes his employer." *Id.* at 6, *quoting Willis v. Dep't of Agriculture,* 141 F.3d 1139, 1143, 1144 (Fed Cir. 1998). *See also Horton v. Dep't of Navy,* 66 F.3d 279, 282 (Fed. Cir. 1995). The court held that "reporting in connection with assigned normal duties is not a protected disclosure covered by the Act." *Id. See also, Langer v. Dep't of Treasury,* 2001 WL 1090206 (Fed. Cir. Sept. 19, 2001).

In *Huffman*, the Court looked to the core purposes of the Act and found that they were "simply not implicated by such reporting." *Id*. The court held:

> [e]xtending the WPA's protections to such situations would be inconsistent with the WPA's recognition of the importance of fostering the performance of normal work obligations and subjecting employees to normal, non-retaliatory

> discipline. ... While dictionary definitions of the term 'disclosure' obviously provide little assistance in determining whether Congress intended normal duties to be covered by the WPA, it is appropriate for us interpret the statute in light of its central purpose."

Id. See also, American Nuclear Resources v. USDOL, 134 F.3d 1292, 1295 (6th Cir. 1998). The "core purpose" of the WPA is the same as that of other whistleblower legislation: to protect citizens who "go above and beyond the call of duty and report infractions of law that are hidden." *Id.* These statutes "protect government employees who risk their own personal job security for the advancement of the public good by disclosing abuses by governmental personnel," and "encourage disclosures ... likely to remedy the wrong." *Id.* at 6, *quoting Willis*, 141 F.3d at 1144.

Complainant contends that Respondent is incorrect in its premise and that the cited cases in fact support Complainant's position because Complainant reported his concerns directly to the United States Attorney, to various chiefs at the DOJ, and to Congressman Kucinich, who were outside of Complainant's normal chain of command. It is therefore important to distinguish between the situations alleged by Complainant.

As noted by Respondent, much of Complainant's alleged protected activity was performed within the scope of his job description as an AUSA which cannot be found to be protected activity. Complainant's position as an AUSA involves the review of cases, the recommendation whether to prosecute and all activities involved in seeing the matters to conclusion. For example, a recommendation to prosecute is part of Complainant's basic job description. The give and take between he and his supervisors concerning these recommendations cannot therefore be construed as protected activity. Complainant can only claim protected activity if he proves he has gone outside the chain of command in reporting suspected problems. If he has taken such action, this may be found to be participation in a protected activity. Therefore, the record must be reviewed with these parameters in mind.

First for review is Complainant's protected activity claim for his work generally as a representative of the USAO and the task force throughout his career with DOJ prosecuting criminal environmental violations. Complainant alleges that in fulfilling his duty to prosecute environmental crimes, his efforts were stymied by those in DOJ supervisory positions. For example, Complainant testified that in March 1992, due to his dissatisfaction with his performance review rating by his direct supervisor, Mr. Cain, Complainant reported the alleged disparate treatment he was receiving from Mr. Cain relating to his work in environmental crimes to United States Attorney George:

> I arranged a meeting the day after the file review where Cain had shoved the rating things in front of me to sign. I hadn't even read them. I didn't know I had been reduced in appellate. I was fed up with these [disparaging] comments, and, [after I painted my house] he kept asking me over and over again what I had done with the solvent that I had used or paint thinner in painting my house, and I took these things as indications of harassment ... and I talked to Mrs. George and Foley came into the room. I explained

> these comments I was getting and the feedback I was getting about the task force, and that I was very upset. ... He was retaliating against me for following my orders."

(Tr 148-49). Complainant also testified that he had reported or discussed Mr. Cain's conduct with Environmental Crimes Section Chiefs Saraken, Solow, and Uhlmann. (Tr 261-64).

As stated in *Huffman*, it would defeat the purpose of the environmental whistleblower statutes to allow an employee to invoke the protection of these statutes for merely performing his everyday job responsibilities. In order for Complainant's activity to be protected, his disclosure would have necessarily been to someone outside of the DOJ chain of command or involve matters other than his daily activities.

It is clear from the evidence of record, that Complainant believed himself and his environmental work to be the subject of harassment and discrimination by various levels of his DOJ supervisors. Complainant has alleged that his supervisors were not only unsupportive, but also abusive to him, and made a conscious effort not to prosecute certain environmental crimes that he believed should be prosecuted. However, his anger over decisions not to prosecute or appeal certain cases, cannot fairly lead to a successful whistleblower protection claim without offending the purpose of the environmental whistleblower legislation.

Actions of his supervisors in relation to Complainant's performance of daily employment tasks cannot be found to be retaliatory in nature. Complainant is at the top grade for an AUSA and a review of Complainant's salary increases compared to the departmental salary caps reveals that Complainant reached the salary cap for his position in April 1995 and has received the annual cost of living increase in January of each following year. (See Appendix C). A review of Complainant's performance evaluations shows that his overall performance evaluations were at the excellent level. (RX O). Complainant has alleged that he was not promoted to the position of Senior Litigation Counsel or Chief of the ECS as retaliation in or about 1994 due to a pattern of harassment. The record shows otherwise. The hiring process, as explained by Mr. Edwards, where numerous candidates were reviewed and rated, does not show evidence of any animosity geared towards Complainant. (Tr 827, See RX Z 3 for memoranda regarding the hiring decisions from the two jobs applied for by Complainant).

In addition, lack of retaliation can be shown by comparing Complainant's recommendations for prosecution with the actions eventually taken. At the hearing, Complainant testified that:

a All 17 environmental cases assigned to Complainant were assigned by Mr. Cain.
b. All charging recommendations made by Complainant were approved by all superiors except in the Safety Kleen case.
c. All of these cases were resolved by plea agreements.
d. Appeals were recommended by Complainant regarding sentencing in *U.S. v Bogas* and *U.S. v Rutana*, and although Mr. Cain recommended against appeals in both,

the cases were appealed and resulted in harsher sentencing. (First Assistant, U.S. attorney for N.D. of Ohio, and Solicitor General all approved appeals). (Tr 325-335).

The U.S. Attorney's Office, Criminal Division, is staffed by well-educated, highly motivated individuals whose job it is to enforce the criminal laws of the United States. Work in the area is, by definition and necessity, stressful. It involves constant decision making with little time for reflection. An effective prosecutor must be confident of his opinions and decisions, and a forceful personality is an asset to the position. Such traits lead to strong opinions and require the ability to espouse and defend such opinions. The nature of the interactions described by Complainant regarding prosecution decisions are to be expected and are found to be a normal part of the give and take expected in such an office. When forceful individuals have differing opinions, tempers are bound to flare. In such an atmosphere arguments are likely to occur and it can be expected that language may at times be significantly less than polite. Zeal may be mistaken for intimidation.

Prosecutorial discretion has been defined as a prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, plea-bargaining, and recommending a sentence to the court. BLACK'S LAW DICTIONARY (7th Ed. 1999). As stated by First Assistant Edwards, "prosecutorial discretion is basically the authority that the United States Attorney has to determine whether nor not a case will or will not be prosecuted, who should be assigned to what particular case, who should prosecute what case, and how a case should be prosecuted. The United States Attorney is the chief law enforcement officer in each federal judicial district and has the authority, within ceratin guidelines [such as] the United States Attorney's manual, principles of federal prosecution, to run the office the way he or she sees fit for the benefit of the citizens of that district." (Tr 812).

None of the prosecutions handled by Complainant involve any aspect of protected activity. The decision of whether to prosecute must be left to those with authority to do so. This is the essence of prosecutorial discretion.

Protected Activity - The Safety Kleen Case

Complainant was assigned to work on the Safety Kleen case between 1991 and 1995, after which the investigation was transferred to the Environmental Crimes Section (ECS). Complainant alleges that the DOJ abused its discretion by not following his recommendation to prosecute in the Safety Kleen case. Complainant contends that the U.S. EPA, the FBI and the DOJ acted in concert to insulate a former U.S. EPA employee, who now worked for Safety Kleen, from prosecution. He claims this as a protected activity. (Complainant's Final Brief at 32).

Complainant argues that after the transfer of the case, the ECS further hampered the investigation by not investigating the field notes taken by the National Enforcement Investigations Center (NEIC) that revealed significant amounts of contaminated waste found at the sites in

question. (Complainant's Final Brief at 36).

In response to Complainant's allegations, Respondent argues that the ECS decision to decline prosecution of Safety Kleen is not relevant to Complainant's claims, and that even if it were, the evidence overwhelmingly establishes that the case did not warrant prosecution.

Respondent notes that Complainant was assigned to the Safety Kleen case only from 1991through 1994. The case was then transferred to the ECS, so that although he remained informed of the proceedings, Complainant was not involved when the decision not to prosecute was made. Respondent argues that Complainant also ignores the undisputed fact that the case was not declined by the USAO, it was declined independently by the ECS, thus making the case irrelevant to this complaint.

Daniel Watson

Mr. Watson, who was familiar with Safety Kleen through ths involvement with the task force, testified on behalf of Complainant regarding the investigation. He described the actions of Safety Kleen:

> Safety Kleen has a division that deals with de-greasing ... canisters or drums that they lease out to gas stations and metal shops. ... They periodically come and change out the solvent drums and put in clean ones. These drums go to ... a facility where the drums are to be emptied, the solvent reclaimed, and the drums cleaned and put back into service or disposed of depending on their condition. (Tr 193).

Mr. Watson explained that some drums were not being reclaimed and were taken to a scrap yard without proper removal of the solvents whereby hazardous contents were being spilled and dumped illegally. (Tr 194).

Complainant

Complainant testified that he was assigned to investigate the Safety Kleen case in 1991. He discussed a complication involving what became known as the "one inch rule." (Tr 267). This rule, Complainant contends, was intended to provide a safety net for companies that tried to remove viscous material from a drum and used all reasonable means but were unable to fully rid the drums of the viscous materials. (Tr 268). He points out that over 60 EPA agents and over 50 FBI agents assisted in searching seven locations. (Tr 270).

Complainant stated that in November 1995 he sent a memo to the U.S. Attorney and the First Assistant U.S. Attorney requesting authorization to give immunity to various individuals who would testify before a grand jury. (See CX 31V, Tr 275). Regarding the request, Complainant explained:

> This was [Mr. Stickan's] idea. They were not supportive of working the case longer, and they said, let's close it down, and they said, what we will do is we will just bring company

> officers in and see if they admit the activity, and if they admit the activity, we will have a case to charge and if they don't we won't. It was based on that and the immunity requests were made. ... When I submitted immunity requests, [around 12 to15] and the idea was to take the less culpable managers and see if they would cooperate, and if they would, give them immunity and see if we could make cases against some of the hierarchy.

(Tr 490).

Complainant testified that he was authorized to extend grants of immunity to a small group of individuals but that the case was transferred shortly after that:

> When I informed the U.S. EPA about that, they became very concerned and didn't want to go that route, and then very shortly thereafter, they requested that the case be transferred to ECS so that they have more time to work it, or that's what I was told.

(Tr 492).

Shortly after his request was denied, Complainant was no longer involved in the investigation or prosecution of the case. (Tr 276). The case was transferred to the ECS for prosecution in June 1995. (See CX 31R, Tr 276). Complainant issued a memorandum to his supervisors, Mr. Stickan, Mr. Cain, Mr. Edwards, and Mr. Sweeney, dated June 30, 1995, regarding his understanding of his role in the case after the transfer:

> Pursuant to discussion between our office and the [ECS] of the DOJ in Washington, D.C., it is agreed that the [ECS] will take over responsibility for the Safety Kleen investigation. The [ECS], however, will have to go through our office to obtain grand jury subpoenas, and we will therefore be assisting in the investigation and to some degree monitoring it. Therefore, it is my understanding that I am to keep my file open because there will be some activity on my part even though the case is not being handled by our office.

(RX Q9). Complainant testified that following two additional years of investigation, Mr. Uhlmann, then chief of the ECS, decided not to prosecute this case. (Tr 271).

David Uhlmann

Mr. Uhlmann began working for the DOJ in 1990 as trial attorney in the ECS and became Assistant Chief in 1998. He was made Chief of the ECS in June 2000. (Tr 542). Mr. Uhlmann was the lead attorney working Safety Kleen after the case was transferred from the USAO in 1995. He said it was the decision of the ECS not to present the case for indictment.

Mr. Uhlmann identified four elements to the case: (1) that defendant was disposing of waste; (2) that the waste was hazardous; (3) that the disposal was done knowingly; and (4) that it was done without a permit. (Tr 625). Mr. Uhlmann testified that the second element could have been rebutted by the application of the one-inch rule. (Tr 626).

Mr. Uhlmann said that the evidence from 1991 and 1992 had included inside sources explaining about this "potentially huge conspiracy involving one the of the nation's biggest hazardous waste handling companies sending all this waste to Cleveland. Suddenly, we were being told that instead of the drums being a quarter to a third full, they had a shot glass of waste still in them, and that's a pretty big difference. A shot glass doesn't get you too far." (Tr 605).

In Mr. Uhlmann's opinion, the case involved testimonial evidence about small amounts of waste which was supported by testing by EPA agents on thousands of pails which revealed only small amounts of waste in the containers. (Tr 615). He explained that because there were not significant amounts of waste found, the issue for prosecution now rested on the highly technical application of the one inch rule or whether Safety Clean had done everything it could do to remove all of the waste from the containers using accepted methods in the industry. (Tr 616).

Mr. Uhlmann said:

> the re-interviews had already started to expose some weaknesses in our case, but when we ... actually met with key people ... the case was severely compromised. We wanted to talk to everybody who was providing us solid evidence at least originally back in 1991 and 1992, that containers still had a lot of waste in them. That was the heart of the case from our perspective, and these folks came in one after the other, and...did not say that for all practical purposes, that killed our case right then and there. There were some other issues too, but that was the key problem that arose with those interviews we did in August 1995.

(Tr 603-04).

Mr. Uhlmann explained that there was, "a lot of documentary evidence," but that, "you are not going to win too many complex cases with documents alone." (Tr 604). He acknowledged that Complainant had done the early phase of the case and pointed out what he thought were the key documents. (Tr 605). "We didn't have what we call a smoking gun document ... short of something like that, documents alone aren't going to get you any convictions in environmental crime cases." (Tr 606). Mr. Uhlmann noted further that there were witness credibility issues because one of the informants had a murder conviction, and another had drug convictions. (Tr 614).

Mr. Uhlmann recalled telephoning Complainant in 1995 and informing him that the witnesses were not saying what had been expected. (Tr 692). In response, Complainant did not indicate or point to any evidence he thought was compelling or would prevent the decision to decline prosecution. (Tr 692).

Mr. Uhlmann said he never discussed Safety Kleen with Complainant's supervisors, Mr. Foley, Mr. Stickan, Mr. Cain, or Mr. Sweeney. The only person he discussed the case and decision with in the U.S. Attorney's office for Northern District of Ohio was Complainant. (Tr

618)

Mr. Uhlmann based his recommendation on the NEIC report which was comprised on field notes taken during the execution of the overt search warrant on June 8, 1992. (CX 31V). The report indicated small amounts of material that in all likelihood would have fallen within the one-inch rule allowance. (Tr 663). Mr. Uhlmann did not review the field notes, because he explained he most likely would have relied on the NEIC report alone in making his decision whether to prosecute. (Tr 671). It was his common practice to rely on NEIC's reports, not field notes, in the course of preparing a case for indictment. (Tr 672). He did not recall Complainant ever telling him to look at the field notes which reflected differing information from the final report, in fact he contends Complainant never discussed field notes. (Tr 683).

The NEIC investigation report dated April 1993 states in part:

> The [NEIC] assisted the Criminal Investigations Division, Chicago Area Office, and the FBI, Cleveland Field Office in a joint investigations of [Drum Restoration Company] which accepts, cleans, and reconditions drums for resale. Information and physical evidence obtained from CID and FBI sources suggested that the company was crushing 5-gallon drums containing hazardous waste, then transporting them to a nearby metal scrap yard. The purpose of this investigation was to determine whether violations of the RCRA had occurred at the site. On April 28 and June 8, 1992, NEIC assisted by conducting two on-site inspections to collect evidence. Forty-nine 5-gallon containers stored on-site contained residual spent solvents and paint waste which exhibited the RCRA hazardous waste characteristic of ignitability.

(CX 31J). The field notes, however, in contrast to the field report, had indicated that there were many drums inventoried that were over three-quarters full. (Tr 669).

Mr. Uhlmann said that if he had known of inconsistencies between the field notes and report, the NEIC investigators would have lost their credibility, and he would not have been able to call them as witnesses. (Tr 675). He explained that if there was a conflict between the field notes and report, he would have wanted to know that and would have reported it to the inspector general. (Tr 683). His opinion was that Complainant should have reported any discrepancies to the inspector general. (Tr 683).

Conclusion

In consideration of the aforementioned testimony and evidence, I concur with Respondent's contention that the decision to decline prosecution in Safety Kleen is beyond the scope of whistleblower protection under the environmental statutes. Not only is the ECS decision not to prosecute Safety Kleen a matter of prosecutorial discretion, but also, the fact that the decision may have been incorrect fails to establish that the governmental actions alleged by Complainant are retaliatory in nature. While Complainant is suspect of the manner in which the ECS proceeded, the case was transferred from Complainant's docket and division to the ECS in

1995 at which point Complainant was effectively excluded from the prosecution of the claim. Any actions by the government after this time, had no bearing on Complainant's employment status.

The South Forty or Cleveland Hopkins International Airport

Complainant alleges that he engaged in protected activity when he attempted to call attention to environmental contamination of land, the "south forty," an area that was subject to a possible runway expansion project at the Cleveland Hopkins International Airport. Complainant's initial connection with this area occurred in 1988 with his involvement in prosecuting *U.S. v. Bogas*.

In the *Bogas* case, a supervisor at the Cleveland Hopkins International Airport was involved in illegal dumping of hazardous material at the airport. (Tr 47, CX 13C). The prosecution led to two guilty pleas but no imprisonment. (Tr 51). The sentence imposed by the United States District Court was appealed by the USAO contending that the sentence did not meet the mandatory sentencing guidelines. (Tr 52). The Circuit Court of Appeals for the Sixth Circuit ruled in favor of the USAO and remanded the case to the District Court for imposition of a new sentence. (Tr 55).

Complainant continued to monitor the condition of the south forty through his involvement with the task force. This involvement lead to Complainant being contacted by Congressman Dennis Kucinich's office in 2000 for information regarding the site. Complainant alleges that his whistleblowing activities regarding the south forty did not involve the usual "chain of command," because of his dealings in this matter with Congressmen Kucinich. The Congressman requested that Complainant be permitted to assist an investigation of the environmental issues at the site. Complainant said that his efforts to open the area to closer scrutiny subjected him to a criminal investigation and ultimately a five-day suspension from his job. (Complainant's Final Brief at 9).

In response, Respondent submitted a Motion to Strike dated December 7, 2001, contending that the evidence relating to the events and conditions at the south forty site and Complainant's congressional contact all post-date the filing of this action and therefore cannot be raised as instances of protected activity. Respondent alleges that the timeliness matter was addressed at the hearing where I determined that the evidence was admissible on a theory of a continuing violation. (Tr 1107-1109). Therefore, Respondent maintains that this evidence should be considered only with respect to alleged retaliation suffered by Complainant under the theory of a continuing violation resulting from protected activities pre-dating the filing of the complaint, and specifically not as constituting protected activity by and of themselves.

I find Respondent's contention unpersuasive. As stated at the hearing in my denial of the motion, Respondent had the opportunity to and did respond to these matters through cross-examination and the presentation of its own witnesses. (Tr 1107-1109). I amended the complaint to include continuing violations. (Tr 1108). The issue of whether the incidents occurring after

the filing of the complaint would be included in this proceeding as evidence themselves of protected activity was not directly addressed. (Tr 1109). The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges provide guidance on this issue:

> When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The [ALJ] may, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are relevant to any of the issues involved.

29 C.F.R. 18.5(e).

I find that the allegations of protected activity occurring after the date of filing are properly within the scope of this proceeding. Respondent had the opportunity to and did address these matters with evidence, cross-examination and argument. (See RX Z6, Tr 502-511) Therefore, the alleged protected activity occurring after the date of filing clearly falls within the purview of 29 C.F.R. 18.5(e). As such, these allegations will be considered within the scope of the original complaint.

Complainant

Complainant initially became aware of the condition of the south forty during the prosecution of *U.S. v. Bogas.* (Tr. 252). After this time, Complainant continued gathering information regarding the contamination of the NASA and Cleveland Hopkins International Airport landfill areas through his involvement in a statewide environmental task force. The task force consisted of various local, state and federal agencies, and officials engaged in environmental crime investigation and prosecution. (Tr 129).

Complainant was contacted in January 2000 by Congressman Dennis Kucinich's office regarding a possible runway expansion at the airport. (Tr 255). Through this contact, Complainant aired his concerns regarding the toxic condition of the south forty area and that the runway expansion project would go through without acknowledgment of the contamination. (Tr 255). Complainant explained that he was required by regulation to report the contact by the Congressman's office to his supervisor Mr. Edwards. (Tr 254).

Complainant testified that on February 2, 2000, he discussed his concerns regarding the airport runway expansion through the south forty with First Assistant Mr. Edwards. (Tr 253). He stated that Mr. Edwards responded by electronic mail (CX 17D) on February 3, 2000, requesting a memorandum detailing the area's contamination. The responsive memorandum addressing the contamination is dated February 29, 2000. (CX 17E, Tr 258). Complainant did not have any formal involvement with this matter after that time. (Tr 259).

Complainant asserts that he was the subject of a pretextual criminal investigation because of his efforts to expose the contamination. (Tr 502). Complainant made a business proposal to NASA which he drafted and printed using his office computer. This proposal was used to initiate a criminal investigation of Complainant which was closed without action but resulted in a civil investigation that led to Complainant receiving a one-week suspension from work. (Tr 504).

Complainant explained that in 1997 he met with the NASA Director and District Counsel and proposed leaving the USAO and assisting NASA in monitoring private contractors and their adherence to environmental laws. (Tr 505). The Director declined his offer. (Tr 507). Complainant testified that the DOJ IG's office subsequently informed him that he was the subject of an investigation because of his business proposal. (Tr 509). Complainant was suspended for five days because of his use of the office computer. (Tr 510).

Complainant filed a second whistleblower action subsequent to the investigation. He explained that his motivation for filing the second claim was the belief that he was retaliated against for filing the above-captioned claim. At the time of filing the second claim he noted he was not yet aware of the "airport cover-up" which he alleges is the true reason for the retaliatory investigation. (Tr 508).

Daniel Watson

Mr. Watson testified on behalf of Complainant regarding the NASA Glenn Research Center and Cleveland Airport investigations. Mr. Watson, a registered professional engineer with the State of Ohio, worked for the U.S. EPA from 1976 through 1988, and then worked for NASA as an environmental engineer and as the chief environmental consultant in the Environmental Compliance Office under the Environmental Management Office. (Tr 165). Between 1994 and 1998, Mr. Watson worked on a "detail" with the U.S. EPA in the Criminal Investigations Division and from 1998 through 1999, he worked on another "detail" for the Cleveland office of the U.S. EPA on an educational outreach (a detail is an agreement of governmental agencies whereby one agency would in essence loan an employee to a fellow agency). (Tr 166). Mr. Watson testified that he was moved from his position at the NASA Lewis Research Center to the U.S. EPA in 1994 in order to be removed from a "bad situation." He described the situation at NASA:

> There were a lot of things like illegal asbestos removals, dry removals, non-reporting on everything from water, asbestos, to hazardous waste. It was just a lot of things that, as somebody that came from the U.S. EPA and had done criminal work, I knew was wrong, and my job was to report those and make sure NASA was doing right and that's where the friction was coming in. I think the final one was, they had excavated the south forty .... and many things were buried there. ... I tried reporting it to the federal EPA and the state EPA , and we tried to do a search for it and were blocked by our own management.

(Tr 167-169).

Mr. Watson described the NASA landfill area which borders the airport's landfill area and is known as the south forty. This landfill has been in existence since the NASA Glenn Research Center was built. (Tr 172). The Glenn Research Center specialized in aircraft work and aircraft and rocket fuels. (Tr 172). He explained that the hazardous materials used in this research were disposed of in the south forty landfill. (Tr 173).

Mr. Watson stated that he first became involved in investigating the south forty area when he worked on the *Bogas* case with Complainant in 1988 through the environmental task force. Mr. Watson was the environmental task force technical consultant. That task force investigated the south forty in 1988. (Tr 181). The investigation was prompted by allegations that a local business owner and the airport commissioner were illegally burying drums of hazardous material in the airport's landfill. (Tr 182). Mr. Watson stated that after the investigation the Ohio EPA hired a contractor to clean up a section of the site where excavation of drums had been done:

> We had this huge hole and we had workers down in there, and I was down in there, and a fellow from the Superfund group, while we were down in there trying to gather samples ... we heard some heavy equipment, it was the Ohio EPA. They brought in a contractor to fill the hole up while we were down in it because the Director of the Ohio EPA was going to have a news conference there and they wanted the site to be, I guess, nice for the TV cameras.

(Tr 190).

Pursuant to a consent order between NASA and the Ohio EPA, NASA participated in an ongoing investigation of the south forty which is being overseen by the Ohio EPA. (Tr 211). The inspection was conducted through the Superfund process beginning with a preliminary assessment, and after completion of the first phase in 1995, Mr. Watson testified that the NASA site was not listed as a Superfund site meaning that it was not put on the national priority list. (Tr 215). Mr. Watson did not know the status of the second phase of the investigation, except for the receipt of information that the contractor had declared bankruptcy, causing a disruption and effectively an end to the investigation. (Tr 217).

Mr. Watson discussed his concerns over the contamination with Complainant:

> The context for sharing that was, I knew [Complainant] had asked about it, because he had worked the cases on the south forty, and from what I remember, it was brought in through the task force which was a body that would investigate things, but it wouldn't necessarily be like a federal criminal case. It would be some things went civil, but it was just some things would be brought in that people should have an awareness of, so again, I don't remember the exact details of that.

(Tr 223).

Mr. Watson was contacted by and interviewed by the FBI in the summer of 2000 regarding the area encompassing the various dump sites around the NASA and airport property, including the south forty. (Tr 224). Mr. Watson was the inspector of the area beginning in 1996 until his retirement in 2000. (Tr 244). Mr. Watson testified that he was represented at the interview by Steven Bell, Esquire. (Tr 225). Mr. Watson explained that he needed to be accompanied to the interview by Mr. Bell for the following reasons:

> I was being pressured by NASA, even put through hell because of this issue ... and really felt I needed somebody on my behalf. [Mr. Bell was] representing me to NASA in what could have gone to a whistleblower case, trying to resolve the situation that I was in. I had been pulled back from the detail. The work I had done and the outreach work had been halted. I had been transferred to the group that I had investigated for the IG's office [and had to report to persons he had criminally investigated], and demoted from the Center's senior environmental consultant to a staff person all in the sweep of a week, and put in an office ... with nothing to do.

(Tr 234-35). During the interview Mr. Watson was asked questions regarding the accuracy of the information contained in a memorandum (CX 17E) dated February 29, 2000, written by Complainant to Mr. Edwards regarding the south forty contamination. (Tr 236).

Mr. Watson had also discussed his concerns over the south forty contamination with an investigator from the NASA IG's office. The investigator contacted him regarding concerns that personnel from the IG's office had pertaining to the runway expansion, and requested that Mr. Watson look over the technical aspects of the case. (Tr 242).

During his tenure with NASA, Mr. Watson had some disagreements with his supervisors, over work matters, principally with his direct supervisor. (Tr 226). Mr. Watson also stated that he began the process to file an environmental whistleblower action against NASA, and informed the NASA IG of this, but didn't file a case due to the onset of serious medical problems. (Tr 226). He knows that he is listed on a NASA IG's list of whistleblowers. (Tr 243).

Taken as a whole, Mr. Watson's evidence confirms Complainant's involvement with the south forty area and his concern over possible environmental problems. His own explanation of alleged retaliation mirrors that of Complainant and substantially reinforces Complainant's perception about his treatment.

William Edwards

Mr. Edwards has been employed by the USAO since 1973 and has been the First Assistant U.S. Attorney for the Northern District of Ohio since 1993. In this position, Mr. Edwards reports directly to the U.S. Attorney. (Tr 737).

Mr. Edwards said that Complainant told him that Congressman Kucinich's office had contacted Complainant regarding the airport expansion. (Tr 847). Complainant had told him that

the Congressman had made a FOIA request and had obtained a number of documents that contained environmental reports that Complainant was being requested to interpret. (Tr 847). On February 3, 2000, Mr. Edwards sent a request to Complainant for a memorandum detailing the NASA and airport property contamination. (Tr 839, CX 17 D).

Complainant drafted a memorandum, dated February 28, 2000 maintaining that NASA management was criminally involved in covering up the ongoing contamination of the site: "The NASA officials are aware of the contamination. ... [John Doe, a NASA official] has been instrumental in declaring this area clean for use in the runway expansion project. This looks criminal." (CX 17E). Mr. Edwards explained that after receiving this information, he telephoned Mr. Martin at the U.S. EPA and Mr. Heranski of the NASA IG's office who both recommended that Mr. Edwards contact the FBI. (Tr 840). Mr. Edwards, Mr. Cain, Mr. Martin, Mr. Heranski and a supervisor of the Public Corruption Squad of the FBI then met in June or July to discuss the allegations. (Tr 842).

Mr. Edwards explained that a decision was made that there was insufficient evidence to prosecute John Doe as accused by Complainant in part due to a five year statute of limitations. (Tr 843). In addition, Mr. Edwards discussed subsequent interviews conducted by the FBI in the matter. Complainant, Mr. Watson and an Ohio EPA employee were interviewed regarding the runway expansion site. Mr. Edwards explained further that it is the Ohio EPA's responsibility to ensure that the proposed runway expansion site is clean before the property is conveyed by NASA to the City of Cleveland for the runway expansion. (Tr 854). Mr. Edwards recalled that the following was gathered from the interview with the Ohio EPA employee:

> She explained that no one had ever said that this property was all clean ... that there were areas that were going to have to be remediated before there could be a runway expansion and we were not, I want to make this clear, were not investigating this as an EPA problem ... we were looking at it purely as whether or not there were any public officials that had committed any crimes ... and we found no evidence of that. (Tr 844).

Mr. Edwards maintained that after the meeting, the decision was made by the FBI, the NASA IG, and the U.S. EPA, unanimously, not to pursue Complainant's allegations. (Tr 845). Mr. Edwards said that he had no knowledge, prior to the hearing, of the bankruptcy and subsequent loss of data collected by R&R International who were performing the second phase of the NASA study conducted pursuant to the Ohio EPA Consent Order. (Tr 850).

Mr. Edwards, as well as other employees who reported concerns to Mr. Edwards, was concerned about Complainant's mental and physical health after his return from open heart surgery in 2000. (Tr 820). They noted he exhibited depressed and isolated demeanor.

Protected Activity

In consideration of the testimony detailed above, I find that Complainant engaged in protected activity through his dealings with the airport runway project. Complainant is entitled to

the protections of the Acts because he went outside of his chain of command through his contacts with Congressman Kucinich regarding the south forty. The dealings with Congressman Kucinich are outside of the holding in *Huffman*. Congressman Kucinich is not in Complainant's chain of command and Complainant's dealings with the Congressman are not a part of his normal work duties. Applying the theory of *Huffman*, Complainant's activities go the "core purpose" of whistleblower statutes in that Complainant risked his "own personal job security for the advancement of the public good by disclosing abuses by government personnel." Accordingly, Complainant has established that he engaged in protected activity.

Respondent's Knowledge of Protected Activity

A complainant must establish by a preponderance of the evidence that the respondent had actual or constructive notice of his or her protected activities. *Morris v. The American Inspection Co.*, 1992-ERA-5 (Sec'y Dec. 15, 1992). Respondent has not argued that it was unaware of Complainant's protected activity. In addition, Complainant was assigned his tasks for environmental crime investigation and prosecution by his supervisors and reported on the progress of his work and the difficulties he encountered to his supervisors on a constant basis. Complainant also discussed his concerns over the airport runway expansion project with his supervisors as well as his contact with Congressman Kucinich's office regarding the matter as evidenced in a memorandum dated February 2, 2000. (RX Z4). Based on the facts of this case, it can not be disputed that Respondent was aware of Complainant's protected activity.

Adverse Action

An adverse action encompasses any discrimination with respect to an employee's compensation, terms, conditions or privileges of employment. *DeFord v. Sec'y of Labor*, 700 F.2d 281 (6th Cir. 1983). Various actions have been held to be "adverse actions," such as:

(1) Blacklisting, or "distinguishing in the treatment of employees by marking them for avoidance." *Leveille v. New York Air Nat'l Guard*, 1994-TSC-3, 4 (Sec'y Dec. 11, 1995).

(2) Demotions, or reductions in salary. *Carter v. Electrical Dist. No. 2 of Pinal County*, 1992- TSC-11 (Sec'y July 26, 1995);

(3) Discharge or lay off. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Emory v. North Bros. Co.*, 1986-ERA-37 (Sec'y May 14, 1987);

(4) Failure to hire, or non-selection. *Frady v. Tennessee Valley Authority*, 1992-ERA-19 (Sec'y Oct. 23, 1995); *Samodurov v. General Physics Corp.*, 1989-ERA-20 (Sec'y Nov. 16, 1993);

(5) Harassment and ridicule. *Saporito v. Florida Power & Light Co.*, 1990-ERA-27 (Sec'y Aug. 8, 1994); *Nichols v. Bechtel Constr., Inc.*, 1987-ERA-44 (Sec'y Oct. 26, 1992).

In the present case, Complainant alleges that he suffered from "harassment and retaliation" by the DOJ because Complainant prosecuted environmental crimes which is protected activity under the aforementioned environmental statutes. In a complaint filed on December 23, 1996 and Complainant's List of Discriminatory Acts by Respondent DOJ, which was filed on October 5, 1998, Complainant avers he has suffered numerous acts of discrimination. (See attachments A & B).

Complainant maintains that the harassment and retaliation he suffered has continued beyond 1998. Specifically, Complainant contends that he was the subject of a pretextual criminal investigation because of his efforts to expose the contamination at the south forty. (Tr 502).

Complainant stated that in 1997 he met with the NASA Director and District Counsel and proposed leaving the U.S. Attorney's Office and assisting NASA in monitoring private contractors and their adherence to environmental laws. (Tr 505). Complainant testified that the Director declined his offer. (Tr 507). Complainant testified further that the DOJ IG's office subsequently informed him that he was the subject of an investigation because of his business proposal. (Tr 509). Complainant was suspended for five days because of his use of office equipment. (Tr 510).

I find that Complainant's well-known interest in the south forty triggered the retaliatory action. The sensitivity of this matter is further supported by the similar treatment Mr. Watson received during the same period. It was during the period of Complainant's recent involvement with this site that the retaliatory action took place.

I find Complainant suffered an adverse employment action by being suspended from work for five days as a result of the DOJ IG's investigation. The retaliation took the form of an arbitrary enforcement of a petty government regulation. The regulation violated prohibits federal personnel from using government owned equipment for their own use.

Petty regulations - the adjective is used after careful consideration of an appropriate term to describe these regulations. Petty means relatively insignificant or minor. BLACK'S LAW DICTIONARY (7th Ed. 1999). In using the term, I am applying it not to the regulations themselves but to the manner in which they are enforced. All regulations are important in that they have a purpose. Punishment should be appropriate in relation to the severity of the activity involved. These regulations may gain in importance in relation to the number of offenses. Examples of personnel regulations fit in this category, include those concerning use of telephones for personal calls, copying personal papers on the office copying machine, using the office computer equipment, and the use of pens, pencils, etc. for personal use.

The other aspect of this labeling is the potential impact of occasional arbitrary enforcement. If directly related to a protected activity it can have a chilling effect.

Nexus

Finally, as Complainant has established that his contact with Congressman Kucinich's office regarding the south forty were protected activity and that he was subjected to discriminatory actions, Complainant now has the burden of raising the inference that the protected activity was the likely reason for the employer's adverse action against him to establish his prima facie case. *See Shelton v. Oak Ridge Nat'l Lab.*, 1995-CAA-19 (ALJ Mar. 3, 1998).

The adverse employment actions were the suspension of Complainant's salary and the methods used in the investigation. With regard to the latter, the investigation of Complainant is particularly remarkable in association with an alleged violation of a petty regulation.

Because of the enforcement of a petty regulation in such close proximity to the protected activity, I find that Complainant has established a nexus between his protected activity and the subsequent five-day suspension. Complainant's business proposal to NASA was drafted in 1997. It is important that the adverse employment action was not taken until after his contact with the Congressman in 2000. This raises an inference of retaliation. Complainant's treatment by the inspector general as well as his superiors at the USAO also raises an inference that the likely reason for the disciplinary action taken was in retaliation for Complainant's activities involving Congressman Kucinich and the south forty. Accordingly, I find that Complainant has established his prima facie case of retaliation in response to his protected activity.

Legitimate Non-Discriminatory Reasons

Once a complainant establishes his prima facie case, the burden of production shifts to the respondent to articulate a legitimate, non-discriminatory reason for the adverse action. *Jackson v. The Comfort Inn*, 1993-CAA-7 (Sec'y Mar. 16 1995). When a respondent proffers a legitimate, non-discriminatory reason for taking the adverse action, thus successfully rebutting the presumption of discrimination raised by the prima facie case, the complainant must prove that the respondent's reason was not the true reason for the adverse action, but rather a pretext for the retaliation for the protected activity. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993)(Title VII Civil Rights Act of 1964). It is well established that a respondent may rebut the prima facie case "by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons." *Vernadore v. Oak Ridge Nat'l Lab*., 1992-CAA-2 (Sec'y Jan. 26, 1996).

Respondent alleges that it suspended Complainant because of his use of an office computer to print a personal business proposal. This offense violates the policies and procedures of the USAO. Therefore, Respondent has produced evidence that Complainant's suspension was based on a legitimate, non-discriminatory policy.

However, it is found that Complainant has produced evidence to rebut Respondent's allegation. He has shown that Respondent suspended him, not for the violation of office policy, but for his activities involving the south forty. While it appears that the adherence to the computer policy of the USAO is non-discriminatory in nature, Complainant has persuaded the undersigned that the adverse employment action taken by Respondent was pretextual in nature.

Because of Complainant's actions pertaining to the south forty, he became the subject of a pattern of discrimination and harassment. This fact is manifested by the use of a petty regulation to suspend Complainant from work for a full week. Additionally, the tactics used in enforcing these regulations are retaliatory in nature.

Considering all of the evidence presented by Complainant, I find that Complainant was the subject of an adverse employment action in retaliation for his protected activity. As such, Complainant is entitled to the appropriate relief authorized by the pertinent statutes.

Damages

Complainant's request for damages includes the issuance of an order which recognizes the existence of a pattern of unlawful discrimination and which directs the Office of the United States Attorney for the Northern District of Ohio to stop any further retaliation. Complainant further requests that the Office of the United States Attorney be ordered to remove from Complainant's personnel files any vestige of unlawful discrimination. It is further requested that the Department of Labor award Complainant an amount of money sufficient to fully compensate him for the suffering he has endured as a consequence of the retaliatory actions of his employer. Finally, Complainant requests that the Department of Labor award attorney fees and litigation costs.

Complainant has alleged that he suffered undue stress and hardship that resulted in the need for open-heart surgery. Complainant testified that his interaction with Mr. Cain caused him stress and anxiety. Complainant claims that as a result of the stress and anxiety, he developed angina which led to a quadruple bypass. (Tr 319). He underwent the surgery in 1999 and returned to work after four weeks. (Tr 322). Complainant has failed to establish any connection between his physical ailments and the retaliatory actions of Respondent. Therefore, damages are not appropriate in relation to Complainant's heart condition.

In addition, I have found that Complainant was not subjected to a pattern of unlawful discrimination prior to his interactions with Congressman Kucinich or that his personnel files contained evidence of unlawful discrimination. Therefore, Complainant's request that USAO remove any vestige of unlawful discrimination from his personnel file is not warranted.

I have found that Complainant was subjected to unlawful discrimination in the form of his five- day suspension. The appropriate remedy for this retaliation must be determined. The statutes under which Complainant has claimed protection provide for the following damages:

Clean Air Act (CAA), 42 U.S.C. §7622(B) (1994)

> If in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the

Secretary may order such person to provide compensatory damages to the complainant.

Solid Waste Disposal Act (SWDA), 42 U.S.C.§ 6971(b) (1994)

If [the Secretary] finds that a violation of subsection (a) did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of the employees to his former position with compensation.

Federal Water Pollution Control Act (WPCA), 33 U.S.C. § 1367(b) (1994)

If [the Secretary] finds that a violation of subsection (a) did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of the employees to his former position with compensation.

The CAA authorizes damages to compensate a complainant for losses regarding the terms, conditions and privileges of employment. The SWDA and WPCA also authorize damages in an amount to compensate a complainant for employment losses, but are more liberal and are not limited to compensatory damages.

Complainant suffered a financial loss relating to the terms and conditions of his employment during his suspension. The loss is the amount that it would cost to restore him to the financial and employment condition he would have had if he were not suspended. This would include lost wages, leave, seniority and fringe benefits. This amount is to be calculated in accordance with Paragraph Nine of the Findings and Conclusion listed below.

In addition to compensatory damages, I find that exemplary damages are warranted in this case. The decision to award Complainant exemplary damages is based on the chilling effect caused by Respondent's illegal activity. Other personnel must be assured that they will not be singled out for similar selective enforcement of petty government regulations. In order to insure this result for Complainant and other personnel and to deter similar behavior by Respondent, the damages must be sufficient to have a definite financial impact on the agency. As all federal agencies are operated according to budget, the amount should be enough to have an impact on the budget. Budgetary amounts for personnel are usually calculated based on salary and fringe benefits. Since Complainant's salary is a matter of record, exemplary damages are assessed at an amount of approximately two times his most recent yearly salary. This will take into account and recognize the fringe benefits that are not accurately calculable from the record. Accordingly, it is necessary to address the availability of exemplary damages under the relevant Acts.

The CAA is clear on its face that exemplary damages are not permitted. "[I]t is clear that Congress intended to allow 'compensatory damages,' and nothing else." *DeFord v. Secretary of*

Labor, 700 F.2d 281 (6th Cir. 1983). The Court in *DeFord* addressed the Energy Reorganization Act ("ERA") whistleblower provisions, which are identical to the provisions of the CAA. As the Court stated, "[t]he statute is not ambiguous on this point." *Id*. Considering the identical wording of the ERA and the CAA, it is clear that only compensatory damages are available under the CAA. However, the phrasing of the CAA is not reproduced in the SWDA and the WPCA.

The damages provisions of the SWDA and the WPCA are identical. These statutes do not contain the same limitations as the CAA. Unlike other environmental and nuclear safety employee protection provisions, the Toxic Substances Act and the Safe Drinking Water Act explicitly permit "where appropriate" exemplary damages. 15 U.S.C. § 2622(b); 42 U.S.C. §300j-9(i)(2)(B)(ii). The damages provisions of the SWDA and the WPCA do not expressly, on their faces, permit or disallow the award of exemplary damages. The statutes at issue provide that the "party committing [the violation] take such affirmative action to abate the violation" as deemed appropriate, "but [such action is] not limited to" compensatory damages. Therefore, I am not limited to awarding only compensatory damages to Complainant under the provisions of the SWDA and the WPCA. As such, because of the arbitrary nature of the retaliation and the serious chilling effect of this type of retaliation, I have determined that exemplary damages are appropriate. Complainant is therefore to be paid $200,000.00 in exemplary damages.

FINDINGS AND CONCLUSIONS

1. None of Mr. Sasse's activities involving the review and prosecution of cases named in the Appendix and the Safety Kleen matter involve protected activities under the whistleblower protection provisions of the Clean Air Act, 42 U.S.C. §7622 (1994), the Solid Waste Disposal Act, 42 U.S.C.§6971 (1994) and the Federal Water Pollution Control Act, 33 U.S.C. §1367 (1994).

2. None of the activities named in the complaint other than those set out in Paragraph Four of these Findings and Conclusions are protected activity.

3. The complaint has been amended to include those matters occurring in 1998 and the years thereafter (Tr. 1107-1109) for the purposes of protected activity and retaliation.

4. Mr. Sasse's communications with Congressman Kucinich are protected activity.

5. Respondent's suspension of Mr. Sasse for five days in 2000 is an illegal retaliation under the whistleblower protection provisions of the Clean Air Act, the Solid Waste Disposal Act and the Federal Water Pollution Control Act.

6. Respondent's proposed legitimate rationale for the suspension is a pretext and not the actual reason for the suspension.

7. The arbitrary enforcement of a petty government regulation as defined in the body of this decision is the illegal reason for Mr. Sasse's suspension.

8. Mr. Sasse is not entitled to any relief because he suffered no damages as a result of any of the actions described in Paragraphs One and Two of these findings and conclusions.

9. Mr. Sasse suffered a loss when he was suspended and is entitled to compensation in an amount to be calculated and ordered after the submission of the information described in the Damages Section of this decision. The parties are to submit within 30 days a proposed total amount isolated to this aspect of damages. All calculations used must be included.

10. The whistleblower protection provisions of the Solid Waste Disposal Act and the Federal Water Pollution Control Act permit the award of exemplary damages in this case.

11. The arbitrary enforcement of the petty government regulations discussed in this decision creates a substantial chilling effect on the likelihood of Mr. Sasse and other employees of the United States Attorney's Office for the Northern District of Ohio, engaging in protected activity.

12. A substantial amount must be awarded in order to offset the chilling effect of the illegal activity and to prevent the repetition of such activity.

13. An amount of $200,000 is sufficient to have the impact required by Paragraph Twelve.

ORDER

1. Respondent will cease and desist from any further arbitrary enforcement of petty government regulations against any employee.

2. Respondent will pay Mr. Sasse for his illegal suspension in an amount to be calculated as set forth in the body of this decision. An Order setting the exact amount will be issued after the receipt of the information required.

3. Respondent will pay Mr. Sasse $200,000 in exemplary damages.

ATTORNEY FEES

Complainant's attorneys are entitled to be compensated for all of their time and expenses in the prosecution of this case. 42 U.S.C. §7622 (1994); 42 U.S.C.§ 6971 (1994); 33 U.S.C. § 1367 (1994). They are ordered to submit a Proposed Order Granting such fee and expenses

along with a detailed rationale for such amount. Such Proposed Order shall be submitted no later than **July 15, 2002.**

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GERALD M. TIERNEY
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.7(d) and 24.8.